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APPENDIX A

ILLINOIS SUPREME COURT
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December 4, 1996

Ms. Leslie G. Offergeld
Walker & Williams, P.C.
4343 West Main Street
Belleville, IL 62223

No. 81777 Charles A. Harper, respondent, v. Missouri Pacific Railroad Company et al., petitioners. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 26, 1996.

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NO. 5-95-0514

CHARLES A. HARPER,
Plaintiff-Appellee,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants-Appellants.

Appeal from the Circuit Court of Madison County

No. 93-L-1209

Honorable Daniel J. Stack, Judge, presiding

[Filed: Aug. 6, 1996]

JUSTICE GOLDENHERSH delivered the opinion of the court:

A preliminary injunction was entered in August 1993, after defendants instituted a policy concerning the investigation of claims of injured employees brought pursuant to the Federal Employers' Liability Act (the Act) (45 U.S.C. §§ 51 through 60 (1993)). In *Harper v. Missouri Pacific R.R. Co.*, 264 Ill. App. 3d 238, 636 N.E.2d 1192 (1994) (hereinafter *Harper I*), we upheld in all respects the entry of the trial court's preliminary injunction enjoining defendants' policy of requiring notice of and prior consent to interviews with railroad employees who had information concerning claims under the Act, except we did not allow for *ex parte* interviews of defendants' employees when on defendants' property during the working hours of such employees. Defendants now appeal from the order entering a permanent injunction and from the trial court's entry of an order of contempt

against defendants for an alleged violation of the preliminary injunction order. Defendants raise the following issues: (1) whether the trial court erred in admitting former testimony, given at the preliminary injunction hearing, as evidence at the trial for the..permanent injunction, (2) whether the Act gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees, (3) whether plaintiff sustained his burden of proving he would suffer irreparable harm if his attorneys could not interview, ex *parte,* managerial, supervisory, or office employees, (4) whether the trial court's finding that defendants engaged in affirmative conduct which had the effect of inhibiting employees with knowledge of facts incident to plaintiff's claim from furnishing information to his attorneys was against the manifest weight of the evidence, (5) whether the scope of the permanent injunction is overbroad, (6) whether the trial court erred in holding defendants in contempt, (7) whether the trial court's finding that the revision of a work rule violated the preliminary injunction order was against the manifest weight of the evidence, (8) whether the trial court's finding that the rule was revised in wilful violation of the preliminary injunction order was against the manifest weight of the evidence, (9) whether the trial court erred in ordering defendants to pay plaintiff $150 per day from April 10, 1994, through the day the rule was rescinded or revised, and (10) whether the letters required by the contempt order are unnecessary and prejudicial to defendants. We affirm in part, reverse in part, and remand with directions.

Since we have previously set forth the facts pertaining to the entry of the preliminary injunction order (see *Harper I)* we need not repeat those facts here. Instead, we choose to recite only the additional facts necessary for an understanding of the instant matter. Please refer to *Harper I* for the history of the instant case.

[The following material is nonpublishable under Supreme Court Rule 23 and MR No. 10343 (Official Reports Advance Sheet No. 15 (July 20, 1994), eff. July 1, 1994).]

STATEMENT OF FACTS

A. The permanent injunction.

On March 7, 1995, the trial court conducted a hearing on plaintiff's motion for a permanent injunction. Plaintiff moved for the admission of the report of proceedings from the preliminary injunction hearing that was held on December 7 and 8, 1993. The trial court allowed plaintiff to submit said report of proceedings over defendants' objection. The facts adduced from these witnesses' testimony are outlined in *Harper I.*

At the hearing on the permanent injunction, defendants called plaintiff to testify. Plaintiff is a 25-year veteran of Union Pacific Railroad Company (Union Pacific) who suffers from carpal tunnel syndrome. Because plaintiff suffers from a repetitive trauma injury, there are no actual occurrence witnesses. Plaintiff testified that during his career with the railroad he witnessed two employee injuries. When he attempted to come forward with information concerning these accidents, he was immediately harassed by the railroad's claims agent. Plaintiff testified that this intimidated him about supplying information relative to employee injuries. Plaintiff explained that he was instructed by three of his former immediate supervisors that should he see a fellow employee get injured, he "should't see it." Plaintiff specifically recalled Ike Johnson, Ike Phillips, and Hillard Phillips telling him not to report accidents. Consequently, plaintiff believed that if he came forward with information concerning employee injuries, he would be fired. Plaintiff stated that for at least the last five to eight years his supervisor has been Rick Martin. Plaintiff agreed that since Martin has been his supervisor, no one from the railroad has ever tried to intimidate him from filling out an accident report or from talking to an attorney for an injured coworker. Plaintiff also agreed that he filled out accident reports regarding both of the accidents he witnessed; however, with regard to one such victim, David Campbell, plaintiff testified that when a claims agent came to plaintiff's home to discuss

the Campbell incident, plaintiff felt intimidated. Plaintiff testified that as the result of filling out the accident report, he was given "some dirty duties."

The next witness to testify was Michael Williams, a trackman with the railroad since 1970. Williams testified that he has never felt threatened or intimidated about giving statements to an attorney for an injured employee. Williams admitted that he did not want to talk to plaintiff's attorney prior to trial, but he explained that it was out of ignorance of the court system rather than because of intimidation by the railroad. While Williams did not talk to plaintiff's attorney even after plaintiff's attorney so requested, Williams did talk to attorneys for the railroad.

Vernice Bundy, section foreman for the railroad and an employee of the railroad since 1970, stated that Rick Martin, his supervisor for the past six or seven years, has always told him to report accidents. Bundy witnessed one accident last year and filled out an accident report. Bundy has never talked to an injured worker's attorney about a case but stated that if he was ever approached, he would not hesitate to talk to the attorney. On cross-examination, Bundy, who previously worked for Ike Johnson and Hillard Phillips, admitted that he was told by both that if he saw an employee accident, he should say that he did not see it. Bundy does not believe that this policy is in effect anymore because these men are either retired or dead and the policy was never in writing.

Robert Tritch, employed by the railroad since September 1990, was called by defendants. Rick Martin is also his supervisor. Tritch stated that he has never been threatened personally by the railroad about reporting accidents, but he also stated that he feels there is an atmosphere of intimidation surrounding injuries, especially for employees of the railroad who have been there longer than he has. Tritch stated that he knows people who have been intimidated and discouraged from talking to an attorney for an injured worker. Tritch feels the railroad is getting more and

more safety concious all the time and that the railroad never takes any responsibility for accidents. Tritch explained, "If you're hurt, it's not their fault, it's your fault because they've got a rule to cover everything that [sic] you know, and if they don't have a rule for that situation they'll come up with a new rule."

Ali Jones was next called by the defense. Jones is a 24-year veteran of the railroad and is currently a trackman. Rick Martin is also Jones' supervisor and has been for the past seven or eight years. Since Martin has been a supervisor, no railroad employees have ever intimidated him about reporting accidents. Jones stated that after reading the new rule of the railroad regarding the four categories of persons a worker can talk to after witnessing an accident, he would not talk to plaintiff's counsel unless he first got an okay from his supervisor.

Wallace Deal, track foreman and a 25-year veteran of the railroad, worked directly with plaintiff for three or four years and is also supervised by Rick Martin. In the past five years, Deal has never been intimidated or threatened with discipline if he reported an accident. Deal did state that he has heard of other employees who were intimidated or harassed by the railroad for reporting injuries. Deal agreed that in the past he was told that if he ever saw an accident, he should not see it, which he interpreted as a threat by the railroad to take an employee's job for reporting an accident. Deal denied any fear today, however, and stated he would report an accident. Deal further testified that even today, particularly among laborers, there is an atmosphere of fear which exists for reporting injuries. Laborers fear for their jobs and might be reluctant to report injuries. Deal also believed that employees would probably volunteer less information on the subject if one of the railroad's representatives or attorneys were present during a discussion. Deal agreed that the new rule regarding who a worker can talk to after witnessing an accident probably means that employees should not be giving statements to the attorney for the injured party. Deal has witnessed several

injuries and has routinely talked only with claims agents about the injuries. There has never been a lawyer who represented the injured worker present at such discussions.

O.J. Rivers, a trackman for the railroad and another 25-year veteran, was called by the defense. Rivers worked with plaintiff in the past and is now supervised by Rick Martin. Rivers testified he has never been intimidated or discouraged from reporting an accident by any railroad employee. Rivers has witnessed several on-the-job injuries. Claims agents for the railroad routinely interview witnesses with no one else present.

Robert Firstlist, a 25-year veteran of the railroad, was the final witness called by the defense. Firstlist worked with plaintiff in the past. His present supervisor is also Rick Martin. In the past five years, Firstlist has not been intimidated by the -railroad with regard to reporting accidents. According to Firstlist, Martin insists that accidents be reported. Firstlist witnessed an accident and gave a deposition in that case. Firstlist did not remember anyone from the railroad being present at the deposition. On cross-examination, Firstlist admitted that in the past he was told that he "shouldn't be a witness to an injury even if you are a witness." He was told this on more than one occasion by more than one supervisor. Firstlist said that most of the supervisors who made such statements have either retired or died, but that such statements have never been retracted. Firstlist believes things have "changed quite a bit," but he also stated that it was a possibility that the railroad may still not want people to be a witness. On one occasion Firstlist was approached at work by the attorney of an injured employee but refused to talk to the attorney at work. The attorney for the injured party wanted to then meet with Firstlist after work, but Firstlist did not talk with him because he does not "like to be involved in things like that." However, Firstlist stated that it was his own decision not to talk to the attorney, not a decision forced upon him by the railroad. Firstlist does not believe in getting involved unless he is an

eyewitness. Firstlist made a statement in plaintiff's case because he was "under orders" to do so by the railroad. Firstlist explained that during working hours if someone from the railroad asks him to give a statement or to come to court, it is his duty to do so.

At the trial on the permanent injunction, defendants also introduced into evidence the depositions of Floyd Thomas, Elmer Parham, Tony Burks, Joe Crow, and Davis Standridge. These five men worked with Cornell Phillips on the same tie gang since 1982. Phillips testified at the hearing on the permanent injunction, and his testimony was damaging to defendants. For example, according to Phillips the atmosphere on the railroad, in terms of employees feeling free to provide information about injured employees and their cases, was frightening. All five of the witnesses provided by defendants testified via deposition that they have never been threatened or intimidated by the railroads from giving information about a coworker's injury or from talking to an injured worker's attorney.

On June 30, 1995, the trial court entered a permanent injunction, ordering as follows:

"1. Defendants' practice, policy, and use of letters instructing plaintiff's counsel not to conduct interviews of [their employees[,] without [their] knowledge or consent[,] who have knowledge of facts incident to an FELA [Federal Employers' Liability Act] claimant's injury, is void pursuant to 45 USC Sec. 60.

2. Schlichter, Board & Denton and their agents may conduct ex parte interviews of defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant[s'] property or during the working hours of said employees.

3. Any state statute or rule that would prohibit plaintiff's counsel from conducting ex parte interviews with defendants' employees regarding facts incident to FELA claimants' injuries is preempted by federal law. 45 USC 60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA Claimants' injuries, or in any way interfering with ex parte communication by plaintiff's attorneys with their employees regarding such claims, except when on defendant[s'] property or during the working hours of said employees."

Defendants filed a posttrial motion on July 25, 1995, asking the court to vacate its permanent injunction order or, in the alternative, asking for a retrial or for a modification of the order.

On August 16, 1995, the trial court entered an order denying defendants' posttrial motion. In its order, the court clarified the permanent injunction order by substituting the words "Schlichter, Bogard and Denton and their representatives" for the term "plaintiff's counsel" found throughout the order. The trial court found no just reason for delaying either enforcement or appeal of the permanent injunction order, pursuant to Supreme Court Rule 304(a) (155 Ill. 2d R. 304(a)).

B. The contempt order.

On August 2, 1994, plaintiff filed a petition to show cause why defendants should not be held in contempt for violating the preliminary injunction order by revising an employee work rule regarding the giving of statements. Plaintiff's petition for rule to show cause alleged that defendants' revised rule eliminated the phrase "persons in interest" and that the effect of this revision was to prohibit employees from communicating facts relating to other employees' injuries to claimants' attorneys without defendants' authorization.

On November 29, 1994, the trial court issued a citation to show cause, and on March 7, 1995, the trial court heard evidence on plaintiff's petition to show cause. Plaintiff offered into evidence plaintiff's exhibit No. 1, which included a copy of the

revised rule 1.2.6. The new rules took effect in April 1994. In his deposition, Robert Pugmire, Union Pacific's director of operating rules, discussed changes in rule 1.2.6. According to Pugmire, the rule was changed only to make the rule simpler and easier for defendants' employees to understand. Pugmire stated that the rules committee did not consider rule 1.2.6 as a change from the prior rule. Pugmire explained that the revisions in the rules occurred during the 2-1/2-year period preceding April 1994. Pugmire stated that the category encompassed by "officer of the law" was meant to indicate a police officer and that the category "authorized representative of the railroad" consisted of the railroad's line management personnel.

While some employees who testified via deposition or at the trial on March 7, 1995, were not aware of rule 1.2.6, most of defendants' employees agreed that rule 1.2.6 did not specifically state they could give statements to an attorney for an injured worker without authorization of the railroad. As previously discussed, while at least one of defendants' employees testified that he would not be intimidated because of the new rule, others testified they would be nervous about talking to an injured worker's attorney if such a rule was in effect.

On June 30, 1995, the trial court found defendants' implementation of the revision found in rule 1.2.6 a flagrant violation of the preliminary injunction order and ordered defendants to remedy their contumacious conduct by sending out a letter to their employees by July 15, 1995, to rescind or to revise the rule consistent with the trial court's order, and to pay plaintiff the sum of $150 per day for each day from April 10, 1994, to the day the rule was rescinded or revised.

The trial court approved an appeal bond to stay the monetary provisions of the contempt order but denied defendants' motion to stay the nonmonetary provisions of the order. We also denied the motion to stay the nonmonetary provisions of the contempt order. Our supreme court, however, granted defendants' motion

for a stay on the nonmonetary provisions of the order pending appeal.

[The preceding material is nonpublishable under Supreme Court Rule 23].

ISSUES

The first issue we are asked to consider is whether the trial court erred in admitting former testimony, given at the preliminary injunction hearing, as evidence at the trial for a permanent injunction. Defendants assert that the testimony of a witness at a former trial is not admissible in a subsequent proceeding of the same action where there is no showing (1) that the witness is unavailable in a legal sense, and (2) why the witness's evidence deposition could not have been taken if the proponent of the testimony exercised due diligence. Defendants argue severe prejudice by the admission of the former testimony because, defendants claim, such testimony was given before they had an opportunity to conduct discovery and to prepare for a meaningful cross-examination. Plaintiff responds that in the instant case evidence from a prior hearing of the same proceeding was simply incorporated by the trial court acting as a factfinder. Plaintiff insists that this requires no citation because what was done here is no different from what occurs daily in bench-tried cases wherein judges take testimony in intervals separated by time.

Plaintiff is correct that the cases cited by defendants are distinguishable from the case at bar because none deal with the incorporation of evidence from a preliminary injunction into a hearing on a permanent injunction. Plaintiff, on the other hand, does provide us with cases in which the evidence from a preliminary injunction hearing was incorporated into evidence at the hearing for a permanent injunction. See *Hess v. Clarcor, Inc.*, 237 Ill. App. 3d 434, 603 N.E.2d 1262 (1992). However, in *Hess*, the parties stipulated to the incorporation of such evidence. *Hess*, 237 Ill. App. 3d at 446, 603 N.E.2d at 1271. *Peoples*

Energy Corp. v. Illinois Commerce Comm'n, 142 Ill. App. 3d 917, 492 N.E.2d 551 (1986), also allowed for the incorporation of testimony and exhibits from the preliminary injunction hearing into the hearing for a permanent injunction. In that case, the City of Chicago was permitted to intervene in the action as a defendant-counterplaintiff after the conclusion of the preliminary hearing. The city argued on appeal that the testimony and exhibits from the preliminary injunction hearing should not have been admitted at the hearing for the permanent injunction. However, since none of the original parties objected and because the city's intervention was subject to the express condition that it be bound by all prior orders or judgments and all evidence previously received, our colleagues on the First District Appellate Court rejected the city's argument. *Peoples Energy Corp.*, 142 Ill. App. 3d at 935-36, 492 N.E.2d at 565. The court also noted that its decision was based upon the facts that the city was given the opportunity to cross-examine the plaintiff's witnesses and that the city made no specific claims of actual prejudice. *Peoples Energy Corp.*, 142 Ill. App. 3d at 936, 492 N.E.2d at 565.

Here, defendants did specifically object to the incorporation of evidence from the preliminary injunction hearing into the permanent injunction hearing. However, we find that because the trial judge was the same in both hearings, no error was committed in allowing evidence from the preliminary injunction hearing to be incorporated into the hearing on the permanent injunction. While defendants claim prejudice due to the fact that such cross-examination occurred prior to conducting discovery, the record and briefs contain no explanation as to how defendants were actually prejudiced. Defendants were allowed to cross-examine plaintiff's witnesses at the preliminary injunction. Moreover, defendants were certainly within their right to recall any witnesses from the preliminary injunction hearing, but they chose not to do so. Defendants would obviously like this case to drag on interminably, but the trial court rightly chose not to hear repetitive evidence.

The second issue raised by defendants is whether the Act gives plaintiff's attorneys the right to communicate *ex parte* with defendants' employees. See 45 U.S.C. § 60 (1993). Defendants argue that we did not sufficiently address this issue in *Harper I* but only considered it at a preliminary stage. We cannot agree. See *Harper I* for a complete discussion of this issue. *Harper I*, 264 Ill. App. 3d at 251, 636 N.E.2d at 1201-02.

We note that the standards of review in cases involving preliminary injunction and permanent injunction are indeed different, as defendants contend, and thus, *Harper I* cannot be said to be the law of the case in the instant matter. In ruling on a preliminary injunction, we must determine whether the trial court abused its discretion in finding that the petitioner demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed; that the circumstances lead to a reasonable belief that the petitioner will probably be entitled to the relief sought if evidence sustains the allegations in the petition; and that the status quo should be maintained until the case can be decided on the merits. *Dixon Ass'n For Retarded Citizens v. Thompson* 91 Ill. 2d 518, 524-25, 440 N.E.2d 117, 120 (1982). In order for the issuance of a permanent injunction to be upheld on appeal, the trial court's determination is reviewed by a stricter standard. The question is whether a trial court's decision is contrary to the manifest weight of the evidence. A trial court's judgment is against the manifest weight of the evidence only if the opposite result is clearly evident. *Gerber v. Hamilton*, 276 Ill. App. 3d 1091, 659 N.E.2d 443 (1995); see also *Hamer Holding Group, Inc. v. Elmore*, 244 Ill. App. 3d 1069, 1075-77, 613 N.E.2d 1190, 1195-96 (1993). Here, we find defendants' tactic of ignoring our decision in *Harper I* disingenuous, as there is nothing in the record from the hearing on the permanent injunction which indicates we were mistaken in *Harper I*. The witnesses who testified for defendants simply did not provide strong enough testimony to overcome the evidence

produced by plaintiff that among railroad employees an atmosphere of intimidation prevailed.

The third issue raised by defendants is whether plaintiff sustained his burden of proving he would suffer irreparable harm if his attorneys could not interview, ex *parte,* managerial, supervisory, or office employees. Again, we previously addressed this issue sufficiently in Harper I and need not address it herein. See *Harper I,* 264 Ill. App. 3d at 251-52, 636 N.E.2d at 1202-03. After reviewing the evidence presented by defendants at the hearing on the permanent injunction, we find it insufficient to change our previous determination of this issue in *Harper I.*

The fourth issue raised by defendants is whether there was sufficient evidence to establish that defendants engaged in any affirmative conduct which had the effect of inhibiting employees with knowledge of facts incident to plaintiff's claim from furnishing information to plaintiff's attorneys. Likewise, we believe we sufficiently addressed this issue in Harper I when we discussed the fact that plaintiff's attorney, Roger Denton, testified that his law firm stopped their usual and customary practice of interviewing all railroad employees regarding claims under the Act because of the letters it received from defendants threatening ethical charges. *Harper I,* 264 Ill. App. 3d at 251, 636 N.E.2d at 1202. Moreover, in *Harper I* we found that plaintiff had, in fact, already established, by a preponderance of the evidence, that the general atmosphere of the railroad intimidates railroad employees from furnishing evidence in cases brought under the Act (*Harper I,* 264 Ill. App. 3d at 252-53, 636 N.E.2d at 1203), and that by virtue of defendants' intimidating actions, it would be difficult for plaintiff to find employees ready to testify on plaintiff's behalf, thus establishing the need for an injunction. *Harper I,* 264 Ill. App. 3d at 253, 636 N.E.2d at 1203.

None of the evidence presented by defendants on the hearing for the permanent injunction changes our decision from *Harper I.* In fact, a complete review of the transcript from the hearing on

the permanent injunction supports our determination. First, many of defendants' own witnesses corroborated plaintiff's testimony that in the past they had been told that if they saw a colleague injured on the job, "they shouldn't see it." Wallace Deal testified that he heard of other employees who had been intimidated or harassed by the railroad for reporting injuries. Deal stated that even today there is an atmosphere of fear which exists for reporting injuries, especially among laborers. Second, while all of defendants' witnesses at the permanent injunction hearing agreed that their present supervisor had not espoused a belief in not reporting accidents, the overall tone of the testimony leads us to believe that a hostile environment remains. For example, defense witness Williams refused to talk to plaintiff's attorneys prior to the instant hearing but did talk to defense attorneys. Robert Tritch, also defendants' witness, testified that while he has never been personally intimidated about reporting an accident, he believes an atmosphere of intimidation *still* exists and personally knows of some railroad employees who have been intimidated or discouraged from talking to attorneys for an injured worker. Third, the new rule issued by the railroad on April 10, 1994, was found worrisome by some of defendants employees. For example, Ali Jones testified that with such a rule in effect he would not talk to an injured worker's attorney without first getting an okay from a supervisor. Joe Crow and Elmer Parham, who testified via deposition,. acknowledged that the revised rule regarding employee statements concerns them. The evidence presented by defendants at hearing on the permanent injunction does not change our previous determination in *Harper I* with regard to this issue.

The fifth issue raised by defendants is whether the scope of the permanent injunction is overbroad. Defendants insist that if we affirm the permanent injunction, we must limit such relief to plaintiff's case. We disagree.

Again, we believe we sufficiently addressed this issue in *Harper I.* In that case the only thing we found to be overly broad

was the fact that the preliminary injunction allowed for *ex parte* communications with defendants' employees at any time or any place. We found the injunction needed to be limited in that such interviews should not take place on defendants' property or during the working hours of said employees. *Harper I,* 264 Ill. App. 3d at 253-54, 636 N.E.2d at 1204. However, to the extent that the preliminary injunction applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees, we found no error but in fact agreed with the trial court's ruling. *Harper I,* 264 Ill. App. 3d at 253, 636 N.E.2d at 1203.

While it is well settled that courts may not issue a blanket order enjoining any violation of a statute upon a showing that an act has been violated in some respects, courts do possess the authority to restrain violations similar to those already committed. *Interstate Commerce Comm'n v. Keeshin Motor Express Co.,* 134 F.2d 228, 231 (7th Cir. 1943). Here, the trial court was merely restraining defendants from committing additional violations of the Act. Limiting an injunctive order to the instant plaintiff would be an invitation to defendants to commit similar violations in the future. Defendants need to understand that we find these actions reprehensible and an affront to the orderly administration of justice in cases brought under the Act. We strongly believe that any court in the country would be incensed by defendants' flagrant violations of the Act. The scope of the injunction is not overly broad.

The sixth issue we are asked to consider is whether the trial court erred in holding defendants in contempt. Defendants contend that we must vacate the contempt order because when the trial court found defendants in contempt for violating the preliminary injunction order on June 30, 1995, the preliminary injunction order was no longer in existence, as it was superseded by the permanent injunction order. Plaintiff responds, and we agree, that this argument is ludicrous, as the court's contempt

order was based on the hearing held on March 7, 1995, at which time the preliminary injunction was in effect.

The record indicates that on December 9, 1993, the trial court entered a preliminary injunction order. The trial court enjoined defendants from interfering with *ex parte* communication by plaintiff's attorneys with railroad employees regarding claims brought under the Act. Later, the trial court found that defendants deliberately chose to continue the enjoined policy, and on March 26, 1994, as a result of this behavior the trial court held defendants in contempt, finding defendants' contempt to be a serious rejection of the trial court's authority and a continuation of defendants' intimidation of railroad employees. The trial court then found that defendants' revision of their rule regarding employee statements which was effective on April 10, 1994, and which eliminated the clause "persons in interest," constituted a "wilful and flagrant violation of [the trial court's] preliminary injunction order." Therefore, the preliminary injunction was in effect at the time defendants behaved contumaciously. Accordingly, we find that the trial court's contempt order of June 30, 1995, was valid even though the permanent injunction issued on that date.

The seventh issue we are asked to consider is whether the trial court's finding that the revision to the work rule violated the preliminary injunction order was against the manifest weight of the evidence. The eighth issue raised by defendants is whether the trial court's finding that the rule was revised in wilful violation of the preliminary injunction order was against the manifest weight of the evidence. Because these issues are so similar, we choose to consider them together. Defendants contend that plaintiff failed to sustain his burden of proving that the revision of the work rule was made in violation of the preliminary injunction order. Defendants also argue that the evidence showed that the rule was revised before the injunction was issued and the committee that revised the rule was unaware of the

section of the Act at issue. Plaintiff responds that he met his burden, as it is inconceivable that the revision was done for any other purpose than to attempt to prevent defendants' employees from providing information to injured parties' attorneys. We agree with plaintiff.

Defendants' former rule 807(2) states as follows:

> Except when authorized by proper authority:
>
> (2) Information as to the facts pertaining to the injury or death of an employee must not be given to anyone except a person in interest, such as the injured employee, or an immediate relative of the injured or deceased employee, or to an officer of the law."

Defendants' revised rule 1.2.6, effective April 10, 1994, provides:

> "Except when authorized by the proper manager:
>
> Information about the facts concerning the injury or death of an employee may be given only to the injured or deceased employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law."

The burden of proof of showing contempt is on the party bringing the request to show cause, and it must be shown by a preponderance of the evidence. *In re Marriage of LaTour,* 241 Ill. App. 3d 500, 608 N.E.2d 1339 (1993). Noncompliance with an order is a *prima facie* showing of contempt. *In re Marriage of Logston,* 103 Ill. 2d 266, 285, 469 N.E.2d 167, 175 (1984). It is the trial court's function to weigh evidence and to make findings of fact. Unless we can say that the trial court's holding is manifestly erroneous, we will not disturb a trial court's ruling. *Southern Illinois Medical Business Associates v. Camillo,* 208 Ill. App. 3d 354, 369, 567 N.E.2d 74 (1991). "In determining

whether there has been a violation of a court order, the order must be construed with reference to the context in which it was issued and the purpose for which it was requested." *Doe v. Lutz,* 2S3 Ill. App. 3d 59, 64, 625 N.E.2d 325, 329 (1993).

The trial court's preliminary injunction order was clear. Its purpose was to prohibit defendants from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with their employees regarding such claims." In revising the rule regarding employee statements, defendants eliminated the clause "persons in interest." The trial court in its order dated December 9, 1993, noted that attorneys who represented employees asserting claims under the Act are "persons in interest." The trial court obviously believed that the removal of the words "persons in interest" approximately four months after the December 9, 1993, order was not a mere coincidence and chose to disregard Robert Pugmire's testimony that the change was made in order to make the rule simpler and easier to understand and that the "rules committee" did not consider rule 1.2.6 a change from the prior rule. "Where an evaluation of credibility of the weight of the evidence was made by the circuit court, a court of review cannot substitute its judgment for that of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as clearly to require a different conclusion." *People v. City of East St. Louis,* 206 Ill. App. 3d 626, 639, 564 N.E.2d 1372, 1381 (1990). Here, we agree with the trial court's determination that the revision was done in wilful violation of the preliminary injunction.

The ninth issue we are asked to address is whether the trial court erred in ordering defendants to pay $150 per day from April 10, 1994, through the day the rule was revised or rescinded. Defendants argue that the award cannot be characterized as an award of attorney fees and costs, but rather the $150 per day was

intended to be a penalty in the form of damages, payable to plaintiff, which is improper in contempt proceedings. Further, defendants contend that the issue of whether the amount imposed by the trial court was inappropriate for a fine payable to the public was not an issue raised by the contempt order and, thus, we cannot consider that issue. Plaintiff responds that the trial court was within its discretion to order payment of $150 per day and that such payment should be considered attorney fees and costs and whatever amount which can be considered unreasonable as attorney fees is still payable to plaintiff because plaintiff has been irreparably damaged to the extent that employee witnesses to plaintiff's injury have been intimidated by defendants' flagrant contempt of court. Assuming, *arguendo,* that the $150 per day is found to be a fine, plaintiff responds that the fine imposed should be paid to the public as opposed to plaintiff.

In a civil contempt proceeding, which means that the sanction imposed is strictly coercive *(People ex rel. Chicago Bar Ass'n v. Barasch,* 21 Ill. 2d 407, 410, 173 N.E.2d 417, 418 (1961)), a court may imprison or fine for contempt of its orders but is without authority to recompense an aggrieved party for his damages. *In re Marriage of Wilde,* 141 Ill. App. 3d 464, 473, 490 N.E.2d 95, 101 (1986). It is well settled that in Illinois civil contempt is not a private remedy but is punishment for an affront to the authority of the court, and hence, any fine imposed is payable to the public treasury and not to the plaintiff. *Frank B. Hall & Co. v. Payseur,* 99 Ill. App. 3d 857, 863, 425 N.E.2d 1002, 1006 (1981) (citing *Rothschild & Co. v. Steger & Sons Piano Manufacturing Co.,* 256 Ill. 196, 99 N.E. 920 (1912)). It is appropriate in both civil and criminal contempt cases to require the contumacious party to bear the reasonable costs and attorney fees of a contempt proceeding, especially where, such as here, a private litigant brings before the court the fact of an indirect contempt. *Wilde,* 141 Ill. App. 3d at 473, 490 N.E.2d at 101; see also *Payseur,* 99 Ill. App. 3d at 862, 425 N.E.2d at 1006.

In the instant case, the trial court ordered defendants to pay plaintiff $150 a day for every day from April 10, 1994, through the day the rule was revised or rescinded. We agree with defendants that the result of such a ruling was to levy a fine payable to plaintiff, which is inappropriate in Illinois in cases of indirect civil contempt. The trial court did not schedule a hearing to determine the reasonable costs and attorney fees borne by plaintiff in conjunction with the contempt proceeding. Therefore, we believe it appropriate to reverse that portion of the trial court's contempt order which requires defendants to pay the $150 per day to plaintiff. On remand, we order a hearing to determine plaintiff's reasonable costs and attorney fees associated with the contempt proceeding. That amount should be paid directly to plaintiff. The $150 per day ordered by the trial court should go directly to the public coffers via the clerk of the circuit court.

The final issue we are asked to consider is whether the court-ordered letters are unnecessary and prejudicial to defendants. Defendants contend that the letter required to be sent to each of defendants' employees is unnecessary if rule 1.2.6 is revised to conform to the prior rule, since any changes in the rules will be communicated to the employees by defendants, as is defendants' usual procedure. Additionally, defendants contend the content of the letters is prejudicial to defendants because the content does not provide an exception for interviews on railroad property or during employees' working hours. Defendants also complain that the letters require them to instruct their employees to disregard rule 1.2.6 in its entirety, which they argue is inappropriate since the entire rule was not the subject of the rule to show cause. Specifically, another portion of rule 1.2.6 provides:

> "Information in the file or in other privileged or confidential reports of the railroad concerning accidents or personal injuries may be given only to an authorized representative of the railroad."

Defendants maintain that if the letters are sent, their employees would be invited to purge defendants' files and disclose confidential reports and information to claimants' attorneys. Plaintiff responds that the letters are appropriate and within the trial court's discretion to order in light of defendants' repeated violations of court orders.

The following letter was ordered sent to all defendants' employees:

> Enclosed is a copy of an Order entered on January 5, 1995[,] by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded."

Defendants cite no case law to support their proposition that the letters ordered by the trial court are unnecessary or unduly prejudicial. Upon review of said letter, we cannot say that the trial court abused its discretion in ordering that copies be sent to all of defendants' employees. It is obvious from the trial court's June 30, 1995, order finding defendants in contempt that the trial court was outraged by defendants' actions in revising the rule regarding employee statements. We are unconvinced by defendants' argument that sending such letters is the equivalent of inviting defendants' employees to purge files and disclose confidential information. As plaintiff points out, the letters clearly state that rule 1.2.6 regarding *statements* should be disregarded,

thus limiting the inapplicability of the rule to that section only. Additionally, we note that confidentiality in employee files is implicit, and ordering further language to be added to the letter to state such a fact is in our estimation unnecessary. Therefore, we find no error in the trial court's decision to order said letters to be sent.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed in part and reversed in part, and the cause is remanded with directions. We order that the mandate issue instanter. *We order that defendants take the required actions immediately.* We see no valid reason for any further delay of enforcement of this injunction.

Affirmed in part and reversed in part; cause remanded with directions.

HOPKINS, P.J., and KUEHN, J., concur.

APPENDIX C

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NO. 5-93-0803

CHARLES A. HARPER,
Plaintiff-Appellee,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants-Appellants.

Appeal from the Circuit Court of Madison County

No. 93-L-1209

Honorable Daniel J. Stack, Judge Presiding

[Filed: June 10, 1994]

PRESIDING JUSTICE LEWIS delivered the opinion of the court:

The defendants, Missouri Pacific and Union Pacific Railroad Company, appeal from the trial court's entry of a preliminary injunction which prohibits the defendants from "carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA [Federal Employers Liability Act (45 U.S.C. sec. 51 *et seq.* (1993))] claimants' injuries, or in any way interfering with their employees regarding such claims, until further order of [the] Court," the court finding that the practice is void pursuant to section 60 of the FELA (45 U.S.C. sec. 60 (1993)). The defendants also appeal from the trial court's entry of a temporary restraining order (TRO) enjoining the same acts of the defendants as those enjoined under the preliminary injunction.

We consider three issues on appeal: (1) whether the defendants preserved their right to appeal the trial court's denial of their motion to dissolve the TRO; (2) whether the trial court abused its discretion in entering the preliminary injunction; and (3) whether the preliminary injunction is overly broad. For reasons we will more fully state herein, we affirm in part and reverse in part.

Plaintiff, Charles A. Harper, filed a complaint against the defendants on November 19, 1993. The first count alleged negligence under the FELA. The second count asked for a declaratory judgment that the defendants' practice of requiring consent before plaintiffs' attorneys were allowed to talk to railroad employees in the investigations of FELA claims was barred pursuant to section 60. The third count requested temporary and permanent injunctive relief from the defendants' policy of requiring notice of and prior consent to interviews with railroad employees who were witnesses to or who had information concerning FELA claims.

The Federal statute which plaintiff claims the defendants have violated is, *inter alia*, as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest * * * shall [be subject to criminal penalties.]" 45 U.S.C. sec. 60 (1993) .

I. TEMPORARY RESTRAINING ORDER

On November 22 through 24, 1993, plaintiff's attorney sent written notices of a hearing set for November 24, 1993, to several

different attorneys representing the defendants. Copies of the complaint, including the request for the TRO, were delivered to at least two attorneys for the defendants. Due to the unavailability of the trial judge, no hearing was conducted on plaintiff's request for a TRO on November 24, 1993 . No one appeared for the defendants at the Madison County courthouse on November 24, 1993.

On November 29, 1993, plaintiff's attorney appeared before the trial court, and the TRO was entered, based upon the allegations of the verified complaint and attached affidavits. Plaintiff's attorney informed the trial court that he had called the defendants' law department in St. Louis, Missouri, that morning informing the defendants of the hearing on that date. The trial court entered the TRO, specifically finding that the defendants had actual knowledge of the motion for the TRO but had failed to appear. The TRO enjoined the defendants from "the practice of requiring knowledge and consent of witness/employee interviews concerning facts incident to FELA * * * claimants' injuries or in any way interfering with ex parte communication by plaintiffs' attorneys with its employees regarding such claims." The TRO was entered at 10:30 a.m. on November 29, 1993, and was to remain in effect until December 7, 1993.

On December 6, 1993, the railroad filed a motion for dissolution of the temporary restraining order. On December 7, 1993, before the court began its hearing on plaintiff's request for a preliminary injunction, the trial court heard extensive arguments from both parties concerning the railroad's motion to dissolve the TRO. The trial court denied the motion to dissolve the TRO. On December 7, 1993, the railroad filed its notice of appeal pursuant to Supreme Court Rule 307(a)(1) (134 Ill. 2d R. 307(a)(1)) from the order denying its motion to dissolve the TRO.

Supreme Court Rule 307(a)(1) provides:

> "An appeal may be taken to the Appellate Court from an interlocutory order of court
>
> (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." (134 Ill. 2d R. 307(a)(1).)

Under subsection (a) of Rule 307, the notice of appeal must be filed within 30 days from the entry of the interlocutory order. 134 Ill. 2d R. 307(a).

Turning now to the issues in the case at bar, it is apparent that whether the defendants had notice or not is irrelevant. The TRO expired by its own terms on December 7, 1993, the day that the trial court denied the defendants' motion to dissolve. In *People v. Conrail Corp.* (1993), 251 Ill. App. 3d 550, 622 N.E.2d 29, the court pointed out:

> "A case becomes moot when, pending the decision on appeal, events occur which render it impossible for the reviewing court to grant effectual relief to any of .the parties. [Citations.] An injunction that has expired can no longer be dissolved because the court can not dissolve that which no longer exists. (*Conrail Corp.*, 251 Ill. App. 3d at 557, 622 N.E.2d at 34.

By the time the notice of appeal from the denial of the motion to dissolve the TRO reached this court, there was nothing to dissolve. Moreover, the preliminary injunction was issued on December 7, 1993, and it superseded the TRO, which would make the TRO moot even if its term had not expired. We need not, therefore, discuss whether the written notices sent by plaintiff to the defendants' attorneys of a hearing asking for a TRO on November 24, 1993, delivery of copies of the complaint to two of the defendants' attorneys, and a telephone call to the defendants' law department on November 29, 1993, to tell counsel of the hearing on that date were sufficient notice to the defendants.

There apparently is some confusion about TROs and about what a defendant must procedurally do to protect and defend against a TRO. (See *People v. Conrail Corp.* (1993), 251 Ill. App. 3d 550, 622 N.E.2d 29; *Williams v. Nagel* (1993), 251 Ill. App. 3d 176, 620 N.E.2d 1376, *appeal allowed* (1994), 154 Ill. 2d 570, 631 N.E.2d 719; *People v. Conrail Corp.* (1993), 245 Ill. App. 3d 167, 613 N.E.2d 784.) It should be noted from the outset that a TRO is a quick, short-term process that is intended to maintain the status quo. It is not meant to be an instrument that causes protracted litigation because of its brief duration due to expiration by its own terms, cessation by law, or supersedence by an order entered in the proceeding for a preliminary injunction. The propriety of the issuance of the TRO becomes moot once the TRO is no longer in existence, except for the question of assessing damages for the wrongful issuance of such. 735 ILCS 5/11-110 (West 1992); *Conrail Corp.*, 251 Ill. App. 3d 550, 622 N.E.2d 29.

There are two types of TROs, those granted with notice to the adverse parties and those that are granted without notice, *ex parte*, to the adverse parties. Either way, relief from a wrongful granting or denial of the TRO should be rendered expeditiously.

Part of the confusion apparently arises from the fact that Rule 307 was amended in 1988, effective January 1, 1989, by the addition of paragraph (d), which provides as follows:

> "(d) Appeals of Temporary Restraining Orders; Time; Memoranda.
>
> (1) *Petition; Service; Record.* Unless another form is ordered by the Appellate Court, review of the granting or denial of a temporary restraining order as authorized in paragraph (a) shall be by petition filed in the Appellate Court, but notice of interlocutory appeal as provided in paragraph (a) shall also be filed, within the same time for filing the petition. *The Petition* shall

be in writing, state the relief requested and the grounds for the relief requested, and *shall be filed in the Appellate Court,* with proof of personal service, *within two days of the entry or denial of the temporary restraining order from which review is being sought.*

(2) *Legal Memoranda* . The petitioner may file a memorandum supporting the petition which shall not exceed 15 typewritten pages and which *must also be filed within two days of the entry or denial of the temporary restraining order.*

* * *

(4) *Time for Decision; Oral Argument.* After the petitioner has filed the petition, * * *, the Appellate Court shall consider and decide the petition within two days thereafter." (Emphasis added.) 134 Ill. 2d R. 307 (d) .

The defendants cite *Bohn Aluminum & Brass Co. v. Barker* (1973), 55 Ill. 2d 177, 303 N.E.2d 1, wherein our supreme court held that the refusal to dissolve a temporary restraining order is appealable under Rule 307(a)(1). Since subsection (d), dealing specifically with TROs, was added to Rule 307 in 1988 (see 107 Ill. 2d R. 307 for the Rule prior to January 1, 1989), subsection (a) has been superseded and, therefore, the *Bohn Aluminum* ruling is no longer applicable to appeals of TROs. All matters pertaining to TROs should comport with the intent and purpose of Rule 307(d), which is to provide a process for a quick review of the granting or denial of a TRO.

The process under Rule 307(d) is clear when a plaintiff has given notice to the defendant of its intent to obtain a TRO and the defendant appears in opposition before the circuit court. The aggrieved party has two days to file its notice of interlocutory appeal and petition in the appellate court.

The process is not so clear where the defendant is given only minimal notice, such as in *American Warehousing Services, Inc. v. Weitzman* (1988), 169 Ill. App. 3d 708, 533 N.E.2d 366, where plaintiff telephoned defendant 30 minutes prior to appearing before the trial court, but where the defendant failed to appear for some reason. The question arises in such a case, assuming that the notice was proper, as to whether the defendant may file a motion to dissolve or must the defendant immediately file its notice of interlocutory appeal and petition in the appellate court? There is no prohibition that we are aware of against the filing of a motion to dissolve in this situation, and in fact, we encourage such because it provides the trial court with the opportunity to void or modify the TRO, if justice requires. Further, it provides an opportunity for the parties to agree to a particular TRO pending the hearing for a preliminary injunction, and thus, an appeal may be avoided. However, in the situation where the defendant had notice of the TRO, the defendant should be prepared to comply with the jurisdictional requirement of Rule 307(d) by filing his notice of appeal and petition in the appellate court within two days of the issuance of the TRO in the event the trial court denies or fails to hear the motion to dissolve within two days of the issuance of the TRO. If the defendant fails to perfect his appeal within two days of the granting of the TRO, this court lacks jurisdiction to hear such.

We next review the situation where a TRO is granted without notice to the adverse party. Section 11-101 of the Code of Civil Procedure provides:

> "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." (735 ILCS 5/11-101 (West 1992).)

Rule 307(d) provides that an appropriate supporting record shall accompany the petition for an appeal of a TRO. It would appear that since the adverse party must obtain all the documents, certifications, or affidavits necessary for a supporting record on appeal, the adverse party most likely would avail itself of one more remedy, that is, obtaining a ruling on a motion to dissolve from the trial court before appealing.

May an adverse party, who did not have notice of the hearing in which the TRO was granted *ex parte*, appeal without filing a motion to dissolve if the TRO has been granted more than two days prior to service on the adverse party? We choose not to suggest an answer at this time.

We are also cognizant of Rule 307(b), which provides for appeals when interlocutory orders are entered on *ex parte* applications, provided a motion to vacate the order is first presented to the trial court. Neither party mentions this section, nor would it be applicable, since it also was in existence prior to subsection (d) being added to Rule 307. The 30 days allowed to file an appeal make subsection (b) just as inapplicable and unworkable as subsection (a) for the purposes of expeditious appellate review of TROs.

The plaintiff in the case at bar argues that the defendants, pursuant to Rule 307(d), had to file a notice of interlocutory appeal and a petition in the appellate court within two days of the entry or denial of the TRO, and not the entry of an order denying the motion to dissolve the TRO. This argument does not make sense if applied to an adverse party that had no notice of plaintiff's petition for a TRO. How can one appeal from a TRO of which one is unaware? All a plaintiff would have to do in some cases is to wait two days before service of the TRO on the defendant, and, thus avoid an appeal.

Even if a defendant is made aware of the TRO after its issuance, our reasoning above applies to the filing of a motion to

dissolve whenever a party had notice but failed to appear. Section 11-101 gives the defendant a right to file a motion to dissolve when a TRO is issued without notice. If we force the defendant to appeal within two days of the issuance of the TRO, defendants may lose their right to have the trial court reconsider its ruling, because of the time constraints. Moreover, we wish to give the trial court the opportunity to correct, modify, or void the TRO in order to avoid unnecessary appeals and the difficulties placed on this court by Rule 307(d) of hearing and deciding an appeal within two days. Finally, in many cases, the parties may agree upon the terms of a TRO pending the hearing for the preliminary injunction, thus avoiding an appeal or a miscarriage of justice. Thus, an adverse party to the issuance of an *ex Parte* TRO should file a motion to dissolve in the trial court as soon as possible and seek a hearing on the motion within two days or sooner from the time of service of the TRO. The losing party, including an adverse party that is unable to obtain a ruling, should file its appeal within two days of the adverse party being served with the TRO.

Plaintiff cites *Williams v. Nagel* (1993), 251 Ill. App. 3d 176, 620 N.E.2d 1376, for the proposition that the defendants have no right to appeal from the December 7, 1993, order refusing to dissolve the TRO; rather, plaintiff argues, the defendants had to appeal within two days from the November 29, 1993, issuance of the TRO. Assuming that the defendants had notice of the hearing on November 29, 1993, plaintiff is correct that the defendants had to appeal within two days. However, *Williams* held that the *plaintiffs*, not the defendants, lost their right to appeal by failing to file a petition and notice of appeal within two days of the denial of the TRO. Further, the *Williams* court stated that "an appeal must be filed within two days of the entry of the *order* sought to be reviewed or the right to challenge the *ruling* will be lost." (Emphasis added.) *Williams*, 251 Ill. App. 3d at 179, 620 N.E.2d at 1378.) The *Williams* court did not limit the

right to appeal to only appealing from orders granting the TROs. *Williams*, 251 Ill. App. 3d 176, 620 N.E.2d 1376.

Finally, we need to mention that the defendants filed a document entitled "Appellant's Brief," which consisted of 47 pages of facts and argument, and which was filed in this court on January 14, 1994, over 30 days after the entry of the order denying the motion to dissolve the TRO. The rule is clear that a party appealing from a TR0 or a denial of a motion to dissolve a TRO is required to file a petition, no longer than 15 pages, stating the relief requested and the grounds for relief, *"within two days of the entry or denial of the temporary restraining order from which review is being sought."* (134 Ill. 2d R. 307(d)(1).) The fact that the defendants did not attempt to comply with any of Rule 307(d)'s mandatory requirements as to the time to file the petition deprived this court of jurisdiction to consider the issues raised by the defendants in regards to the TR0.

Parenthetically, we note that plaintiff argues that the defendants' filing of a document entitled "Appellant's Brief, which is 47 pages long, precludes them from appealing the TRO, since the document should be entitled "Petition" and/or "Legal Memorandum," under the provisions of Rule 307(d). (134 Ill. 2d R. 307(d).) While we agree with plaintiff that the railroad failed to comply with the page-limitation and naming provisions of Rule 307(d), those provisions are not jurisdictional. (See Ill. Ann. Stat., ch. 110A, par. 341, Historical and Practice Notes, at 477-78 (Smith-Hurd 1985) (wherein the page limitation and other technical requirements for briefs in appeals from final decisions are discussed).) These requirements are not jurisdictional, but failure to comply may subject the offending party to sanctions within the discretion of the reviewing court. Since "Appellant's Brief" was not timely filed under Rule 307(d), the question of an appropriate sanction in this case is moot.

II. PRELIMINARY INJUNCTION

A. FACTS

On December 7, 1993, the trial court heard evidence in support of plaintiff's request for a preliminary injunction. Plaintiff first called Cornell Phillips, who was a railroad employee from 1984 to 1987. Mr. Phillips described the atmosphere for employees of the railroad as "frightening." He felt that he could not talk to anyone about the accidents of other employees, and he stated that railroad employees were told that they would lose their jobs if they testified as a witness in any other employee's FELA case.

Plaintiff next called Gary Barker, the assistant general chairman for the railroad employees' union. In his job, he dealt with both railroad employees and management. He felt that the railroad had an "on-going attitude to suppress" information from employees regarding accidents and injuries that occurred at work. There was no doubt in Mr. Barker's mind that railroad employees throughout the several States of his representation were intimidated from providing information to FELA claimants or their attorneys concerning job-related injuries.

Mr. Barker felt that the reason the employees are so afraid to talk about other employees' on-the-job injuries is that they fear they will lose their good jobs. Furthermore, the defendants' rules provide that an employee can be disciplined, even fired, for giving information about job-related accidents to someone outside the railroad, even though employees are required to give statements concerning accidents to the railroad.

Barker identified a copy of a letter from one of the defendants' law firms to plaintiff's law firm. The letter stated, in pertinent part:

> "Please be advised that neither you nor anyone else from your firm or at your direction should come onto the property

of Union Pacific Railroad Company, examine or inspect any equipment of Union Pacific Railroad company without our express written consent. In addition, under no circumstances should you or anyone on your behalf communicate directly with any railroad foreman, supervisors, or office personnel about any aspects of the claim of Mr. Harper. Finally, please advise if you wish to interview *any railroad employees* concerning Mr. Harper's claim. Please do not conduct such interviews without our knowledge and consent.

We believe that attorney ethical rules and laws of most states prohibit contact by you or anyone on your behalf from communicating about your client's claim with any person having managerial responsibility for the railroad, with any person whose statement may constitute an admission of the railroad and any person whose act or omission may be imputed to the railroad for purpose of civil liability. We expect you and others acting on your behalf to honor these principles." (Emphasis added.)

Barker testified that he received several other copies of the same form letter addressed to attorneys representing other FELA claimants, since he is the union representative for these employees.

On cross-examination, Barker admitted that he did not remember having personally met the plaintiff in this case, but he stated that he believed he was plaintiff's union representative, given plaintiff's location. Mr. Barker did not have any personal knowledge of any particular witnesses who had been intimidated by the defendants from coming forward to testify on behalf of plaintiff.

Plaintiff next called Norman Stander, a senior claims representative for the defendants, as an adverse witness. Mr. Stander's job requires him to investigate FELA claims. In doing so, he

routinely talks to witnesses outside the presence of the claimants or the claimants' attorneys. Mr. Stander identified a form letter that was used by the defendants throughout the country, which was the same form letter sent to plaintiff's attorney and to Mr. Barker, the union representative. Mr. Stander did not know the reason the defendants required plaintiffs' attorneys to obtain their consent before interviewing witnesses.

Finally, Roger Denton, an attorney from the law firm representing plaintiff, testified that his practice is limited primarily to representing plaintiffs in FELA litigation. In his eight years of practice, he has always interviewed all "rank-and-file" railroad employees without the prior knowledge or consent of the railroad, and that is the practice of all other attorneys who represent FELA claimants, as far as he knows. He has not found it useful to try to talk to managerial railroad employees, because he has learned that they normally will not talk to him, but he feels that section 60 gives him the right to interview any and all railroad employees if he so desires. He and his law firm stopped interviewing witnesses on FELA cases after they started receiving the form letters from the railroad requiring prior knowledge and consent before these interviews, since they took the threat of having to defend disciplinary actions very seriously.

Mr. Denton additionally testified that plaintiff's injury is a repetitive-trauma injury, resulting in carpal tunnel syndrome, and that there are no occurrence witnesses to any singular event causing plaintiff's malady, but only witnesses who worked alongside plaintiff and observed him working on equipment that required the same physical maneuvers repetitively over the years.

Defendants did not put on any evidence.

B. LAW

When the appellate court reviews the issuance of a preliminary injunction, the sole issue is whether the trial court abused its

discretion. (*Board of Trustees of Community College District No. 508 v. Bakalis* (1980), 80 Ill. App. 3d 502, 400 N.E.2d 47.) If the trial court had a legal basis for granting the injunction, no abuse of the trial court's discretion will be found. (*City of Chicago v. Airline Canteen Service, Inc.* (1978), 64 Ill. App. 3d 417, 380 N.E.2d 1106.) Whether to issue a preliminary injunction is within the sound discretion of the trial court upon a *prima facie* showing of necessity. *Stasica v. Hannon* (1979), 70 Ill. App. 3d 785, 388 N.E.2d 1110.

A *prima facie* case of necessity is established when the party seeking the preliminary injunction presents evidence that (1) it has a clearly ascertained right which is in need of protection; (2) it will suffer irreparable injury without that protection; (3) it has no adequate remedy at law; and (4) it is likely to be successful on the merits. (*Rotary Club v. Harry F. Shea & Co.* (1983), 120 Ill. App. 3d 988, 458 N.E.2d 1002.) The correct purpose of a preliminary injunction is to preserve the status quo or that state of affairs legally existing just prior to the motion for preliminary injunction. (*Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002.) In deciding whether to grant preliminary injunctive relief, the trial court should not decide contested issues of fact, nor should it decide the merits of the case. By the same token, the appellate court should consider the substantive issues only to the extent necessary to determine if the trial court abused its discretion. *Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002.

The defendants argue that plaintiff did not establish the four factors necessary to the issuance of a preliminary injunction. As to the first factor, the defendants contend that plaintiff did not establish a clearly protectable interest, in that section 60 does not grant plaintiffs' attorneys the right to conduct *ex parte* interviews of managerial employees of the defendants or the right to come onto railroad property.

Section 60 was designed to prevent any direct or indirect chill on the availability of information to any party in interest in an

FELA claim. (*Cavanaugh v. Western Maryland Ry. Co.* (4th Cir. 1984), 729 F. 2d 289.) "Therefore, the Act [FELA] is to be read liberally." (*Cavanaugh*, 729 F.2d at 293.) The courts have consistently held that a FELA claimant's attorney is a "person in interest" within the meaning of section 60. (*Sheet Metal Workers International Association v. Burlington Northern R.R. Co.* (8th Cir. 1984), 736 F.2d 1250.) When it enacted section 60, Congress recognized the likelihood that railroad agents would coerce or intimidate employees to prevent them from testifying against the railroad. *Hendley v. Central of Georgia R.R. Co.* (5th Cir. 1980), 609 F.2d 1146.

We cannot conceive, nor is it seriously suggested by the defendants, that there is any purpose for sending the form letters to all FELA claimants' attorneys other than to restrict claimants' attorneys from obtaining information from railroad employees about the facts incident to the injury or death of an employee. The defendants maintain that they have the right to restrict plaintiffs' attorneys from interviewing certain employees and the right to restrict the time and place of such interviews, but they do not dispute that they intended to restrict plaintiffs' attorneys' access to information. The trial court, therefore, did not abuse its discretion in finding that the defendants' policy of mailing form letters to all FELA claimants' attorneys was an attempt to restrict the attorneys' unfettered access to information regarding FELA claims, and that this policy effectively restricted employee information as to the facts incident to employees' injuries. *Stack v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.* (1980), 94 Wash. 2d 155, 615 P.2d 457.

In fact, the railroad does not deny that the portion of the letter requiring prior knowledge and consent of the railroad before an attorney interviews "any railroad employees" is a clear violation of section 60. The railroad merely cites Illinois Rules of Professional Conduct, Rule 4.2 (134 Ill. 2d R. 4.2), which regulates communication with persons represented by counsel, in support

of their contention that plaintiffs' attorneys do not have the right to conduct *ex parte* interviews with managerial employees. However, the defendants admit that the provisions of section 60 preempt State law to the extent of any conflict in the two rules.

Further, section 60 in no way attempts to distinguish between managerial employees and other railroad employees. If Congress intended such, it could and should have set forth the distinction between classes of employees in section 60 or provided for the various States to make exceptions for certain classes of employees. Managerial employees could be witnesses to an accident or they may be aware of certain practices or equipment of the railroad that may be dangerous to its employees. If any employee of the railroad, whether they be management, clerical, or a common laborer, wishes to talk to claimants' counsel, section 60, by its very breadth, prohibits any act by the defendants to effectuate a coverup or to make discovery of the causes of the accident more difficult.

Given the purposefully broad language of section 60 and the courts' uniformly liberal construction of that language, we find that the trial court was within its sound discretion in finding that any State statute or rule, including the Rules of Professional Conduct (134 Ill. 2d R. 1.1 et seq.), that prohibits plaintiffs' attorneys from conducting *ex parte* interviews with the defendants' employees regarding facts incident to FELA claimants' injuries is preempted by Federal law. (See *Mondou v. New York, New Haven, & Hartford R.R. Co.* (1911), 233 U.S. 1, 32 S.Ct. 169.) The defendants cite *Lake v. Orgulf Transport Co.* (W.D. Tenn. 1993), 1993 W.L. 194096, where, in a case with similar facts and a similar letter, the district court indicated that plaintiff's counsel may not have the right to interview corporate employees whose position gives them the legal authority to bind the corporate defendants. This indication by the district court was *dicta*, and there was no discussion as to why certain employees should be treated differently under section 60. We choose not to read

something into section 60 that is contrary to the purpose and clear language of section 60. Therefore, the trial court was clearly within its sound discretion in finding that the defendants' "use of letters instructing plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent" was void under section 60.

The defendants next argue that plaintiff did not establish that he would suffer irreparable harm without the preliminary injunction. The defendants assert that plaintiff's evidence did not establish that any particular employees had been intimidated from giving information to plaintiff's attorney. We do not agree. Plaintiff's attorney testified that his law firm had stopped their usual and customary practice of interviewing all rank-and-file employees regarding FELA claims against the railroad as a result of the letters received from the railroad and especially due to the threat of ethical charges against the law firm.

We do not accept the defendants' argument that there is no irreparable harm to plaintiff because his attorney has not yet been brought up on disciplinary charges. Even if plaintiff's law firm were ultimately vindicated, that does not cure the harm in this case. The threat of ethical charges has been sufficient to chill the attorney's customary practice of interviewing any railroad employee who is willing to talk to the attorney and who has information concerning an FELA claim. Furthermore, the evidence was clear that, generally, railroad employees are afraid to talk to plaintiff's attorneys in FELA actions, for fear of losing their jobs. The defendants' message to plaintiff's attorney and the union representative can only serve to further inhibit any potential witness from voluntarily providing information to persons who have an interest in the FELA claim, in violation of section 60. There was, therefore, sufficient evidence of irreparable harm.

The railroad next argues that plaintiff did not demonstrate that his remedy at law was inadequate. However, the only remedy the

railroad posits is a protective order regulating discovery under Supreme Court Rule 201(c)(1). (134 Ill. 2d R. 201(c)(1).) We do not see why a claimant must seek the protection of a protective order under our discovery rules, when there is a Federal criminal statute available and directly on point. Nor should our discovery rules abrogate a plaintiff's remedy of injunctive relief that has been established by the courts under section 60. See *Hendley v. Central of Georgia R.R. Co.*, (5th Cir. 1980), 609 F.2d 1146.

The harm from the defendants' actions is more likely to arise in the phases of the lawsuit prior to discovery than afterwards. It is elementary that an attorney cannot schedule depositions or frame intelligent interrogatories without having some basic information about the facts of the case, which the attorney often cannot obtain satisfactorily from the claimant alone. Section 60 is a broad protection for FELA attorneys and claimants in their indispensable search for the information necessary to FELA actions. Not only is injunctive relief authorized under section 60 in a case such as this, it is often necessary to accomplish the purpose of the FELA, which is to protect claimants' access to information concerning FELA claims. (*Hendley*, 609 F. 2d 1146; Senate Report Number 661, 76th Congress, 1st Session 2, 5 (1939).) Thus, the trial court did not abuse its discretion in finding that plaintiff did not have an adequate remedy at law.

The defendants additionally argue that plaintiff failed to establish a likelihood of success on the merits. The railroad claims that the evidence did not establish a *prima facie* case that its actions had the effect of inhibiting any particular witnesses from coming forward on this plaintiff's claim. We disagree. Plaintiff did more than establish a *prima facie* case as to himself. He established, by the requisite standard of a preponderance of the evidence (*Rotary Club*, 120 Ill. App. 3d 988, 458 N.E.2d 1002), that the general atmosphere of the railroad intimidates employees from voluntarily furnishing evidence to FELA claimants and their attorneys.

The form letter, sent by the defendants to all FELA claimants' attorneys, could do nothing other than further inhibit employees, including those that would be potential witnesses in plaintiff's case. By the defendants' logic, plaintiff would be required to find the witnesses that were already inhibited from testifying in his case in order to show a likelihood of success on the merits. If plaintiff had the ability to find and talk to these witnesses, as the defendants argue he should have, then, indeed, he would not have had to resort to the court for an injunction. The trial court did not abuse its discretion in finding that there was a likelihood of success on the merits based upon the evidence presented.

III. SCOPE OF THE PRELIMINARY INJUNCTION

The defendants claim that the scope of the preliminary injunction is overly broad. To the extent that the preliminary injunction applies across the board to plaintiff's attorneys and allows them free access to conduct unrestricted, *ex parte* interviews of any and all railroad employees, we agree. The statements in the preliminary injunction that we find objectionable are as follows:

> "2. Schlicter, Bogard & Denton and their agents may conduct ex parte interviews of Defendant's employees regarding facts incident to FELA claimants' injuries.
>
> * * *
>
> 4. Defendants and their representatives are hereby enjoined and restrained from * * * in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims * * *."

The problem with the preliminary injunction is that the defendants could be held in contempt for restricting plaintiff's attorneys from seeking to interview railroad employees during their working hours. Even plaintiff's attorney testified that he did not normally seek to interview employees during their working hours. The defendants have a right to conduct their business in

a safe manner without worrying about plaintiff's attorneys disrupting that work. Therefore, to the extent that the preliminary injunction gives plaintiff's attorneys rights to conduct *ex parte* interviews of any railroad employee at any time or any place, we reverse and remand with directions to the trial court to limit the scope of the preliminary injunction so that it prohibits the defendants from interfering with any *ex parte* communications by plaintiff's attorneys with defendants' employees, except when on defendants' property or during the working hours of said employees.

Affirmed in part; reversed in part and remanded with directions.

GOLDENHERSH, J., and MAAG, J., concur.

APPENDIX D

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CAUSE NO. 93-L-1209

CHARLES A. HARPER,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
and UNION PACIFIC RAILROAD COMPANY,
Defendants.

[Filed: June 30, 1995]

PERMANENT INJUNCTION ORDER

This Court, having heard evidence and arguments of counsel, finds as follows:

1. That this Court has jurisdiction over the subject matter and the parties herein.

2. That Plaintiff has filed an action requesting that this Court declare that Plaintiff's attorneys, Schlichter, Bogard & Denton and their agents, have the right to interview employee witnesses of the Defendants ex parte who have knowledge of facts incident to an injury of a person brought pursuant to 45 U.S.C. 51 *et. seq.* (FELA). Plaintiff alleges that Defendants' practice of requiring its knowledge and consent to employee witness interviews is void pursuant to 45 U.S.C. 60.

3. 45 U.S.C. 60 provides in part that "any . . . device whatsoever, the purpose, intent or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to facts incident to the injury

or death of any employee, shall be void. . . ." The purpose of 45 U.S.C. 60 is to equalize the access to information available to the claims departments of railroads and to individual FELA claimants and their representatives. *Stark v. Burlington Northern Railroad Company*, 538 F.Supp. 1061, 1062 (D.C. Col. 1982). Any action or device of the railroad which effectively restricts employee information as to the facts incident to any employees' injury is prohibited. *Stack v. Chicago Minneapolis-St. Paul and Pacific Railroad Company*, 615 P.2d 457, 461 (Wash. 1980). Attorneys who represent employees asserting FELA claims or "persons in interest" pursuant to 45 U.S.C. 60. *Sheet Metal Workers International Association v. Burlington Northern Railway Company* , 736 F.2d 1250, 1251-52 (8th Cir. 1984).

4. This Court finds that Union Pacific Railroad/Missouri Pacific Railroad has instituted a new policy requiring its notice and consent to interviews of its employee witnesses by Plaintiff's attorneys and other attorneys about facts incident to an FELA claim. This policy of the Union Pacific/Missouri Pacific is being applied to Charles Harper, Plaintiff herein, and to other FELA claimants who are injured while working for Union Pacific/ Missouri Pacific. Attorneys representing the railroad have corresponded with counsel for Plaintiff indicating that railroads' counsel has an ethical obligation to report any ex parte interviews of employee witnesses to the Disciplinary Commission.

5. This Court finds that an actual controversy exists between this Plaintiff and his representatives, and other Plaintiffs' counsel representing injured employees in FELA matters against the Union Pacific/Missouri Pacific Railroad, and the Union Pacific/ Missouri Pacific Railroad. Plaintiff has standing to bring this action because he has incurred, and continues to incur, direct harm as a result of Defendants' policy and practice, and he has a substantive interest in the protection afforded by 45 U.S.C. 60.

6. This Court finds, based on the evidence, that Defendants Union Pacific Railroad Company and Missouri Pacific Railroad

Company have threatened employees who are witnesses to on-the-job injuries, that the effect of such threats is to coerce and intimidate employee witnesses, hindering their willingness to come forward with information about such injuries.

7. This Court further finds that the Defendants have created an atmosphere of intimidation of employees who have knowledge regarding on-the-job injuries, and that such atmosphere has caused some employees to refuse to talk to injured employees' representatives, and to limit their voluntary furnishing of information to employees' representatives. There exists on the part of employees of the Union Pacific/Missouri Pacific Railroad a fear of discipline or discharge if an employee voluntarily furnishes facts incident to an FELA claimant's injuries to the claimant's representatives. Representatives of the railroad, including attorneys representing the railroad, can and have intimidated employee witnesses from voluntarily providing information to claimants' representatives.

8. This Court finds that the purpose and effect of the policy of requiring Defendants' knowledge or consent before employees may be interviewed by injured parties' representatives is to prevent the free flow of information to injured employees and their representatives in violation of 45 U.S.C. 60 and that no adequate remedy at law exists to remedy this situation.

9. Defendants' attorneys, by sending letters suggesting that Plaintiff's counsel is acting unethically by conducting ex parte interview of Defendants' employees, are intimidating the representatives of FELA claimants, and this practice has the effect of preventing employee witness to on-the-job injuries from voluntarily furnishing information to claimants' attorneys, in violation of 45 U.S.C. 60. This Court finds that this is a veiled threat to Plaintiff's counsel, is ongoing and has a chilling effect on the interviewing of witnesses and, therefore, inhibiting the flow of voluntary information from witnesses.

10. Unless Defendants' policy and practice of requiring its knowledge and consent in order for FELA claimant's representative to interview Defendants' employees regarding facts incident to an injury, this Plaintiff, as well as other injured claimants, and Defendants' employees who have knowledge regarding on-the-job injury claims, will be irreparably harmed because their right to have the free flow of information regarding facts incident to FELA claims will be impaired, and cannot be remedied. It is not likely that once a witness has been intimidated, this can be reversed. Plaintiff has no adequate remedy at law.

11. This Court finds that it has long been the practice of FELA claimants' attorneys and their representatives to interview Defendants' employees without the knowledge and consent of the Defendants' and Defendants' new policy, practice, and letters of its attorneys, has and will continue to have, the effect of disrupting this long standing practice of ex parte interviews if this Court does not enjoin the policy and practice.

12. Based on the record before this Court, Plaintiff has shown that a permanent injunction is necessary to maintain the status quo between the parties and their representatives and continue to allow the free flow of information between FELA claimants' attorneys and Defendants' employee witnesses protected by 45 U.S.C. 60. Injunctive relief is available under 45 U.S.C. 60 . *Hendley v. Central of Georgia Railroad*, 49 F.2d 1146, 1152 (5th Cir. 1980). In absence of this Court granting the injunction, Plaintiff and his representatives will suffer greater harm without the injunction than Defendants will suffer if it is issued. That is, Plaintiffs and their counsel, will be inhibited from conducting interviews of witnesses without the injunction, and with the injunction, the investigation of claims will remain in the same manner that existed before this controversy arose. Defendants will not be harmed by the requested injunctive relief.

IT IS, THEREFORE, THE ORDER OF THIS COURT THAT

1. Defendants' practice, pclicy, and use of letters, instructing Plaintiff's counsel not to conduct interviews of its employees without its knowledge or consent who have knowledge of £acts incident to an FELA claimant's injury, is void pursuant to 45 U.S.C. 60.

2. Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries, except when on defendant's property or during the working hours of said employees.

3. Any state statute or rule that would prohibit Plaintiff's counsel from conducting ex parte interviews with Defendants' employees regarding facts incident to FELA claimants' injuries, is preempted by federal law. 45 U.S.C. 60.

4. Defendants and their representatives are hereby enjoined and restrained from carrying out their practice, policy, and use of letters requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or in any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, except when on defendant's property or during the working hours of said employees.

SO ORDERED:

/s/ Daniel J. Stack

DATED: JUNE 30, 1995

APPENDIX E

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

CAUSE NO. 93-L-1209

CHARLES A. HARPER,
Plaintiff,

v.

MISSOURI PACIFIC RAILROAD COMPANY
AND UNION PACIFIC RAILROAD COMPANY,
Defendants.

[Filed: June 30, 1995]

ORDER

On Plaintiff's Petition for a Contempt of Court Order this Court having previously issued its order directing Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company to show cause why they should not be held contempt of court and the Court having heard evidence on the matter, this Court makes the following findings:

1. That on December 9, 1993, this Honorable Court entered a Preliminary Injunction Order finding Defendants' policy of requiring consent to attorney interview with their employees regarding employee injuries to be a violation of U.S.C. Sec. 60.

2. That this Court's Order stated: "Defendants' practice, policy and use of letters instructing Plaintiff's counsel not to conduct interviews of its employees without knowledge or consent who have knowledge of facts incident to an FELA claimant's injury, is void pursuant to 45 U.S.C. Sec. 60."

3. That this Court further stated, "Schlichter, Bogard & Denton and their agents may conduct ex parte interviews of Defendants' employees regarding facts incident to FELA claimants' injuries."

4. That this Court ordered "Defendants and their representatives are hereby enjoined and restrained from . . . requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants' injuries, or any way interfering with ex parte communication by Plaintiff's attorneys with their employees regarding such claims, until further order of this Court."

5. That Defendant railroads were present in court, served with and fully aware of said preliminary injunction Order.

6. That regardless, Defendants repeatedly violated the Order and sent letters to claimants' attorneys, including Plaintiff's attorneys, instructing them not to conduct interviews of their employees without their knowledge or consent.

7. That Defendants deliberately chose to continue their policy enjoined in the December 9, 1993, Order of this Court.

8. On May 26, 1994, as a result of said behavior, this Court held Defendants in contempt of court.

9. This Court found Defendants' contempt "to be a serious rejection of [its] authority" and "a continuation of [Defendants'] intimidation of persons with knowledge regarding injury claims of [D]efendants; employees."

10. That, since the entrance of this Court's contempt Order, this Court finds that Defendants have revised, effective April 10, 1994 their rule regarding employee statements.

11. That Defendants promulgated said revision with full knowledge of the Preliminary Injunction entered by this Court on December 9, 1993.

12. Defendants' former rule regarding statements, Rule 807(2), provided that:

Except when authorized by property authority:

> (2) Information as to the fact pertaining to the injury or death of an employe[e] must not be furnished to anyone except a person in interest, such as the injured employe[e], or an immediate relative of the injured or deceased employe[e], or to an officer of the law.

13. This Court, in its Preliminary Injunction Order dated December 9, 1993, noted that attorneys who represent employees asserting FELA claims are "persons in interest" pursuant to 45 U.S.C. Sec. 60. *Sheet Metal Workers Int'l Ass'n. v. Burlington Northern Ry. Co.*, 736 F.2d 1250, 1251 (8th Cir. 1984).

14. Thus, pursuant to former Rule 807, employees were allowed to furnish information about the facts concerning the injury or death of an employee to claimant's attorneys.

15. That Defendants' revised rule regarding statements Rule 1.2.6 provides otherwise. Pursuant to Rule 1.2.6: Except when authorized by the proper manager.:

> Information about the facts concerning the injury or death of an employee may be given only to the injured employee, an immediate relative of the injured or deceased employee, an authorized representative of the railroad, or an officer of the law.

See Exhibit 1.

16. That Defendants', in revising said rule regarding statements, eliminated the clause "persons in interest."

17. That the effect of said revision is to prohibit employees from communicating knowledge of facts relating to employees' injuries to both Plaintiff's attorneys or other claimants' attorneys without Defendants' authorization.

18. That Defendants' implementation of said revision constitutes a willful and flagrant violation of this Court's Preliminary Injunction Order, which enjoined Defendants from "requiring knowledge and consent of employee witness interviews concerning facts incident to FELA claimants injuries."

IT IS THEREFORE, THE ORDER OF THIS COURT, THAT:

a) Defendants Union Pacific Railroad Company and Missouri Pacific Railroad Company by, on, or before July 15 1995, shall send a copy of this Order and a letter in identical form to that attached hereto as Exhibit 1, to each and every one of their employees.

b) The letters set forth in the paragraph immediately above shall be sent by certified mail, return receipt requested.

c) Defendants shall not seek to discipline, reprimand, suspend, terminate from employment or otherwise harass any employee as a result of that employee's actions in providing information or facts pertaining to the injury or death of an employee to that employee's attorney.

d) Defendants shall rescind Rule 1.2.6 or revise it consistent with this Order.

e) Defendants shall report in a letter to the Court by July 31, 1995, on their compliance with this Order.

f) Defendants shall pay to Plaintiff the sum of $150 per day for every day since April 10, 1994 through the day the rule is rescinded or revised as per this Order

g) A copy of this Order shall be mailed to: Jerome J. Schlichter, Attorney for Charles A. Harper, Schlichter, Bogard & Denton, 100 South 4th Street, Suite 900, St. Louis, Missouri 63102; and Mr. Thomas E. Jones, Attorney for Union Pacific Railroad Company, Walker & Williams, 4343 West Main, Belleville, Illinois 62223.

SO ORDERED, this 10th day of June, 1995.

/s/ Daniel J. Stack
DANIEL J. STACK
JUDGE OF THE
CIRCUIT COURT

EXHIBIT 1

"Enclosed is a copy of a Order entered on January 5, 1995 by the Honorable Daniel J. Stack of the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. The Missouri Pacific Railroad Company and the Union Pacific Railroad Company have been enjoined by the Court from in any way preventing you from providing information about employee injuries to the injured employee's attorney and have been ordered to rescind or revise Rule 1.2.6 regarding furnishing information. You should disregard any rule promulgated or adopted by the company which prevents you from providing information about employee injuries to their attorneys. Specifically, Rule 1.2.6 regarding statements should be disregarded."